OH KENG SENG v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) June 25, 1975]
[Seremban — Criminal Miscellaneous Application No. 1 of 1975]

Criminal Law and Procedure — Trial — Part heard case — Duties of succeeding magistrates — Criminal Procedure Code (F.M.S. Cap. 6), s. 261.

In this case the applicant applied for an order that the former President of the Sessions Court who had been transferred to the Attorney-General's Chambers be precluded from continuing the hearing of a part-heard case in which the applicant was accused of uttering seditious words under section 4(1)(b) of the Sedition Act, 1948.

Held: (1) upon the transfer of the former President of the Sessions Court on his appointment as Deputy Public Prosecutor he has relinquished his powers as a President of the Sessions Court and thereby ceased to exercise any jurisdiction in the trial of the applicant;

(2) in the circumstances of this case the trial of the applicant should be heard *de novo* by a President of the Sessions Court.

Observations on duties of succeeding magistrates.

Cases referred to:-

(1) *Public Prosecutor* v. *Kulasingam* [1974] 2 M.L.J. 26.

(2) *Mohamed Idris bin Haji Mohamed Said* v. *Rex* [1949] M.L.J. 31.

(3) *Teay Wah Cheong* v. *Public Prosecutor* [1964] M.L.J. 21.

CRIMINAL REVISION.

Yeap Ghim Guan for the applicant.

Abu Hashim bin Haji (Deputy Public Prosecutor) for the respondent.

Ajaib Singh J.: The applicant moves this court for an order that Encik Abdul Khalid bin Abdul Manaff the former president of the Sessions court here in Seremban and at present attached to the Attorney General's Chambers and stationed in Alor Star, Kedah, as a deputy public prosecutor, be precluded from continuing the hearing of a part-heard criminal case in which the applicant is accused of uttering seditious words under section 4(1)(b) of the Sedition Act 1948. The applicant seeks a further order that the case be heard *de novo* by the present president who succeeded Encik Abdul Khalid in the Sessions Court with effect from January 1, 1975.

The applicant has filed an affidavit in support wherein he has expressed his fears of not getting a fair trial if the case is continued to be heard by Encik Abdul Khalid. The applicant states that when his case came up for further hearing on May 5, 1975 his counsel Mr. Yeap Ghim Guan objected to Encik Abdul Khalid hearing the case but the objection was overruled. It is also alleged that the transfer of Encik Abdul Khalid to the post of deputy public prosecutor is in effect an abrogation of his previous post as president of the Sessions Court. The applicant states further that there is a real likelihood of Encik Abdul Khalid being biased and that it would be contrary to public policy and natural justice if Encik Abdul Khalid sits as president of the Sessions Court as this would impose on him the dual role of prosecutor as well as the presiding officer of the same court at one and the same time. This would be embarrassing to Encik Abdul Khalid and would be prejudicial to a fair trial. As deputy public prosecutor Encik Abdul Khalid has the Attorney-General as his head of department and it would be embarrassing to Encik Abdul Khalid to adjudicate against his own head of department who has personally sanctioned the prosecution of the applicant. Also Encik Abdul Khalid would have access to the investigation papers which are in the possession of the Attorney-General's Chambers.

Encik Abu Hashim bin Haji Abu Bakar deputy public prosecutor for the State of Negri Sembilan opposes the application and has filed an affidavit in reply. He disagrees that Encik Abdul Khalid has abrogated his former post as president of the Sessions Court and submits that his post has not been degazetted and that he is not debarred from hearing the case. Encik Abu Hashim submits that the allegation of the likelihood of bias in effect holds the integrity of Encik Abdul Khalid in low esteem and suspicion. He says that cogent and convincing evidence to show bias is necessary and the mere allegation of likelihood of bias is not enough. The investigation papers he says are in his possession in Seremban and there can be no question of Encik Abdul Khalid having any access to them and he submits that the application is vexatious and made in order to embarrass a fair trial already in progress and calculated to delay the entire proceedings.

The application before me is not founded on a specific provision of any law but after reading the application and the affidavits I decided to call for the record of the proceedings in the case in question for the purpose of satisfying myself as to the correctness of Encik Abdul Khalid's order overruling the objection of Mr. Yeap Ghim Guan. On examining the record I find that the applicant was charged in the Sessions Court on March 1, 1974 and the trial has so far lasted six days over a period of about a year and two months — four days in June 1974 and on May 5 and 6, 1975. A total of 12 prosecution witnesses have completed their testimony and the 13 and last witness for the prosecution is in the box waiting to be cross-examined by the defence after having completed his evidence-in-chief. There are not many exhibits in the case and it is now fixed for further hearing on July 2, 1975. The protracted hearing of this case appears to be inexcusable. It must be in the interest of the prosecution no less than that of the defence that criminal trials be heard and determined speedily. Not that the trials be rushed however. I feel that in the present case the court and counsel for the prosecution and for the defence could have made a greater effort in bringing about an early conclusion of the trial. For then the problem which we are now dealing with would not have arisen at all. Anyway when the case came up for further hearing on May 5, 1975 Encik Abdul Khalid had already been posted to Kedah as a deputy public prosecutor and before any evidence was recorded on that day Mr. Yeap Ghim Guan objected to Encik Abdul Khalid hearing the case any further but his objection was overruled.

In criminal appeals or criminal revisions affidavits are not required to be filed unless so ordered by the High Court. However, as the affidavits in this case were already filed before I called for the record of the proceedings I decided to take them into consideration in arriving at a decision in this matter. With regard to the allegations made in the applicant's affidavit Mr. Yeap Ghim Guan for the applicant submitted that in

making this application no reflection was intended on Encik Abdul Khalid's personal character or integrity and all that the applicant wished to say was that Encik Abdul Khalid should not be embarrassed because of his dual role as deputy public prosecutor and president of the Sessions Court. I myself do not think that the applicant's affidavit goes to the extent of questioning the honesty and integrity of Encik Abdul Khalid. Encik Abdul Khalid has sat on the bench for quite some time and he is a fairly experienced president of the Sessions Court and I feel confident that should he continue with the hearing of the part-heard case he would not let his mind to be biased or prejudiced. I have no doubt that Encik Abdul Khalid would not be biased or prejudiced against the applicant merely because he is now a deputy to the public prosecutor who had consented in writing to the prosecution of the applicant under the Sedition Act. I feel confident that he would adjudicate upon the case on its merits without being influenced by any extraneous matters.

There are very few decided cases in point. Hashim Yeop A. Sani J. had occasion to deal with a somewhat similar problem not long ago in the case of *Public Prosecutor* v. *Kulasingam*.[1] The accused in that case was charged with an offence under section 409 of the Penal Code. The prosecution closed its case after 27 witnesses had given their evidence and had tendered 98 exhibits. The defence was called and while the first witness for the defence was still in the process of giving his evidence the learned president of the Sessions Court who was presiding at the trial was transferred from his post and appointed a deputy public prosecutor in the same State. Having regard to the large number of witnesses already heard and the large number of exhibits already tendered his Lordship ordered the trial to be continued under the provisions of section 261 of the Criminal Procedure Code. In his judgment the learned judge expressed his opinion that it would have been quite in order for the previous president to have completed the trial which he had partly heard but only if he had been appointed a deputy public prosecutor not in the State where he was previously the president of the Sessions Court but in some other State. To quote —

"... My view has always been that it would be perfectly proper for a President or Magistrate who has since been transferred to the Legal Department to assume functions as Federal Counsel or Deputy Public Prosecutor to complete any part-heard cases originally heard by him in the court where he was previously stationed. But of course this must be subject to an overriding condition that there must not be any possible miscarriage of justice or any contravention of rules of natural justice as for example in a case where the officer concerned was previously a President or Magistrate in the same State but has now been appointed to be a Deputy Public Prosecutor in the same State...."

I have thought this matter over for a while but I am afraid I find it difficult to agree with the dictum of Hashim Yeop A. Sani J. In my opinion Encik Abdul Khalid ceased to exercise any jurisdiction in the trial of the applicant upon his appointment as a deputy public prosecutor no matter where he was transferred to this post. It is true that his earlier appointment as a president of the Sessions Court has not been de-gazetted but that cannot be the sole criterion in deciding whether or not Encik Abdul Khalid has ceased to exercise jurisdiction in the part-heard case. There are other important factors which must be taken into account. These are that Encik Abdul Khalid is now performing entirely different functions as a deputy public prosecutor and that he has vacated his previous post as president of the Sessions Court in Seremban to another officer who has now assumed jurisdiction over all matters pending in that court. As a result Encik Abdul Khalid has in my judgment ceased to exercise the powers of a president of the Sessions Court and he is not competent to continue with the hearing of the part-heard case.

I shall now deal with section 261 of the Criminal Procedure Code. All criminal trials in the subordinate courts are summary trials and a decision in a criminal case is made by the magistrate or president who has himself heard all the evidence adduced at the hearing of the case. However, it does occasionally happen that for some reason or other a magistrate or president ceases to exercise jurisdiction in a trial commenced by him and it is precisely to meet such a situation that section 261 of the Criminal Procedure Code has been enacted. The succeeding magistrate or president has a complete discretion in this matter. He may either hear the case *de novo* or continue from the point where it has been left by his predecessor. If he adopts the latter course the magistrate or president is empowered to act on the evidence which has already been recorded by his predecessor subject to the right of recall of witnesses as provided for in the section. The president who succeeded Encik Abdul Khalid has not taken upon himself to consider section 261 and invoke its provisions presumably thinking perhaps that it was in order for the previous president to complete the trial. In my view it is the duty of the succeeding magistrate or president to take cognizance of all part-heard criminal cases left behind by his predecessor who has ceased to exercise jurisdiction in those cases and to act under the provisions of section 261 by either hearing the cases *de novo* or to continue from the point where they have been left behind by his predecessor.

The provision in section 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved. In the case of *Mohamed Idris bin Haji Mohamed Said* v. *Rex*[2] the appellant was convicted by a magistrate on evidence partly recorded by him and partly by his predecessor. The witness whose evidence was acted on by the succeeding magistrate was a crucial witness and there was nothing to prevent this witness from giving evidence if there had been a trial *de novo*. In ordering a new trial Murray-

Aynsley C.J. referring to section 254 of the Straits Settlement Criminal Procedure Code (which is in *pari materia* with section 261 of our Code) said that

"the power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate, particularly when there is nothing to prevent the witness from giving evidence on the further hearing."

In pointing out what he described as the danger of acting under section 261 of the Criminal Procedure Code Hashim J. in the case of *Teay Wah Cheong* v. *Public Prosecutor*[3] said that unless

"it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case *ab initio* rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor *vis-a-vis* the credibility of the witness."

The applicant is charged with uttering seditious words. By the very nature of the charge the credibility of witnesses is bound to be of paramount importance and I do not think that this is a proper case where the present president of the Sessions Court may continue from where it was left by his predecessor and act on the evidence already recorded. Furthermore all the 13 prosecution witnesses are readily available to give evidence. The hearing by the previous president lasted only six days and I do not think that a new trial will result in much loss of time and expense.

The applicant's anxiety over the hearing of the criminal trial is understandable. He is facing a serious charge of sedition which in the case of a first offence is punishable with a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both such fine and imprisonment. The applicant is a member of Parliament and if he is found guilty and convicted he stands to be disqualified from being a member of Parliament for five years if upon conviction he is sentenced to imprisonment for a term of not less than one year or to a fine of not less than two thousand dollars. As I have stated earlier it is my considered opinion that upon the transfer of Encik Abdul Khalid from Seremban on his appointment as a Deputy Public Prosecutor in Kedah he relinquished his powers as a president of the Sessions Court and thereby ceased to exercise any jurisdiction in the trial of the applicant. Even if Encik Abdul Khalid can still be considered as having the powers of a president of the Sessions Court it is I think highly undesirable that he should hear the criminal case any further. It might perhaps have been a different matter if he had remained in the Judicial Department and had been appointed to some other post such as a Senior Assistant Registrar of the High Court but on being appointed a Deputy Public Prosecutor in the Legal Department Encik Abdul Khalid crossed the floor as it were and he can no longer be in a position where he can command the respect of the public as an impartial arbiter if he continues to hear the criminal case. Justice must not only be done but must also be manifestly seen to be done. This is a cardinal principle in the administration of justice and it must override all other considerations. The judiciary in our country is independent of the executive and the honesty and integrity of the officers who preside over the courts are of a high order. Let us not on any occasion therefore dispense justice in a manner which may undermine public confidence in the judiciary.

In the exercise of my revisionary powers I order that the trial of the applicant be heard *de novo* by the present president of the Sessions Court.

Order accordingly.

Solicitors: *Yeap & Co.*

YOUNG KIM SENG v. ONG HONG BOO

[C.A. (Ajaib Singh J.) July 9, 1975]
[Malacca — Civil Appeal No. 1 of 1975]

Landlord and Tenant — Controlled premises — Purchaser new owner — Main tenancy terminated — Position of sub-tenancy — Claim for possession by new owner — Control of Rent Act, 1966.

The respondent was a businessman and owner of the premises in question which he had bought in February, 1957. The premises were built in 1932 and were therefore subject to the operation of the provisions of the Control of Rent Act, 1966.

The respondent claimed possession of the ground floor of the said premises. The appellant, on the other hand, claimed that he was in lawful occupation of the ground floor from 1950 when he became the sub-tenant of the chief tenant of the premises and he claimed protection under the Control of Rent Act, 1966.

The learned magistrate in the lower court held that so long as the tenant was in actual and lawful occupation then the sub-tenant would be protected under the Control of Rent Act but once the tenancy was validly determined by the tenant himself surrendering it back to the landlord then the protection under the Control of Rent Act was no longer there and the appellant thereafter became a trespasser when he was requested to leave the premises.

The appellant appealed from the decision of the learned magistrate ordering him to give vacant possession of the said ground floor of the premises to the respondent.

Held: as the appellant had obtained his sub-tenancy from the tenant of the premises when the latter was a contractual tenant of the landlord he was therefore protected under the Control of Rent Act. The appeal would be allowed with costs.

Case referred to:-

(1) *United India Fire & General Insurance Co. Ltd.* v. *Jaffnese Co-operative Society Ltd.* [1971] 1 M.L.J. 118.

CIVIL APPEAL.

Andrew Goh for the appellant.

A. K. J. D'Cruz for the respondent.

Ajaib Singh J.: This was an appeal from the decision of the learned magistrate ordering the appellant to give vacant possession of the ground floor of premises No. 2399 Pulau Sebang, Alor Gajah, Malacca, to the respondent. The appellant was also ordered to pay mesne profits until the delivery of possession and costs.